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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TIGER INN,

Petitioner,

—v.—

SALLY FRANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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October 1, 1990

QUESTION PRESENTED

May the members of a private social organization, which satisfies all the criteria for the federal constitutional right to freedom of association (small number of active members, selective membership, financial independence, ownership of its land and building, closed to the public, no business conducted in it or by it, etc.), be deprived of the right to freedom of association because it has certain tenuous relationships with an entity that is not a private organization.

LIST OF PARTIES

The parties to the proceeding below were the petitioner The Tiger Inn and the respondent Sally Frank. The University Cottage Club and Princeton University were parties originally but have settled with respondent and are not named as parties to this petition. The Ivy Club was a respondent-appellant below but has elected not to join in this petition.

Petitioner The Tiger Inn has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner Tiger Inn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey, entered in the above-entitled proceeding on July 3, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 120 N.J. 73, 576 A.2d 241 (1990), and is reprinted in the appendix, p. 1a.

The opinion of the Superior Court of New Jersey Appellate Division is reported at 228 N.J. Super. 40, 548 A.2d 1142 (N.J. Super. A.D. 1988), and is reprinted in the appendix, p. 38a. Neither of that Court's orders is reported. They are set forth in the appendix, pp. 221a, 223a.

Neither the orders nor the finding of probable cause of the New Jersey Division on Civil Rights have been reported. They are set forth in the appendix, pp. 68a, 140a, 158a, 180a, 230a.

None of the decisions of the New Jersey Office of Administrative Law (Miller, J.) have been reported. They are set forth in the appendix, pp. 81a, 143a, 169a.

JURISDICTIONAL STATEMENT

The decision of the Supreme Court of New Jersey ordering Tiger Inn to consider women for membership was dated July 3, 1990. This petition is, therefore, timely. Jurisdiction is conferred by 28 U.S.C. § 1257 (Supp. 1989).

STATUTES INVOLVED

Amendment I of the U.S. Constitution. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1, of the U.S. Constitution. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Tiger Inn was founded in 1890 by a group of Princeton University students who sought to form a "select associa-

tion" for social, recreational and intellectual purposes. As long as it has existed, it has been off the Princeton University campus. In 1894, it purchased land on Prospect Street from a private individual without financial assistance from Princeton University and in 1895 built its present clubhouse, again without financial assistance from Princeton. (Record below "R." at 489a-90a; Testimony of Stuart Rickerson, August 1, 1986 "Rickerson" at 149.)

Today, as always, Tiger Inn is operated and controlled solely by its own members; is governed by its own constitution, bylaws, and certificate of incorporation; is not listed by Princeton University's Dean of Students as an official student organization; and is a self-governing entity. It is run by a Board of Governors, whose members belong to the club and are elected by members of the club. The Board holds meetings, keeps minutes, conducts elections, and enforces the bylaws of the club. (R. at 5327a, 5376a, 5380a; Rickerson at 123.)

The day to day operations of Tiger Inn are managed by a steward who is not an employee of Princeton University. No employees of Tiger Inn are Princeton University employees and none are covered by University-provided benefits. (Rickerson at 126.)

No business is conducted by the club anywhere nor is business conducted by anyone else on Tiger Inn's premises. Neither is any recruiting or career counseling conducted there. Non-members are welcome only as a member's invited guest and may not hire the facilities for any purpose. (R. at 5381a; Rickerson at 150.)

Tiger Inn is a selective organization having an active membership of only 125 (3% of Princeton's 4,000 undergraduates) and an inactive graduate membership of 1,700. The process of selection is rigorous and time consuming, with unanimous approval of the members necessary for admission. Many of the candidates who complete the process are not given offers of membership. The undergraduate members alone control membership policies. (Rickerson at 111, 155.)

Tiger Inn has its own IRS tax identification number and its own IRS employer identification number, both of which are distinct from Princeton University's numbers. It is organized under the New Jersey Not-For-Profit Corporation Laws, N.J.S.A. § 15:1-1, *et seq.*, and exempt from federal taxation under Section 501(c)(7) of the Internal Revenue Code. Tiger Inn pays all local and state taxes on its real estate. Unlike contributions to Princeton, which qualify as charitable contributions, contributions to Tiger Inn are not tax deductible. (R. at 463a, 538a; Rickerson at 125, 166.)

Tiger Inn is now and always has been operationally, financially, and physically independent of Princeton University in every way. No funds have ever been loaned or contributed by Princeton to Tiger Inn. Members of the Princeton faculty and administration do not participate *ex officio* or in any other way in the governance of Tiger Inn. Princeton faculty members do not conduct classes or seminars on club premises. At no time has any University dean or other official had any power to oversee Tiger Inn's activities. Tiger Inn is not listed among the student organizations which are under the authority of the Dean of Student Affairs. (R. at 5327a, 5380a; Testimony of Thomas Wright, August 4, 1986 "Wright" at 74.)

Further, University proctors may not enter the club without the express permission of a club member. Princeton University has no authority to direct Tiger Inn to take or not to take any action, has no jurisdiction over members of Tiger Inn as members, and has no jurisdiction at all over graduate members of the club. The Graduate Board of Tiger Inn disciplines members for disturbances connected with the club; and the local police are called for disturbances, if necessary. (Wright at 732; R. at 721a-22a.)

Tiger Inn is not a part of any club system, nor does it hold itself out as part of a club system. It is not a member of the Undergraduate Interclub Committee or the Graduate Interclub Council. Nor is it a participant in the Prospect Foundation, a non-profit organization supported by other clubs.

(Wright at 27; Exhibits to Tiger Inn's motion dated October 28, 1987.)

Tiger Inn draws its members primarily from the undergraduate body of Princeton University. This is the same as a private social organization in Washington, D.C., drawing its members exclusively from the District. In fact, choosing members from a single, definable pool of candidates is merely an exercise of the right to be selective.

The University does not rely on Tiger Inn to feed its 125 undergraduate members. Thomas Wright, the University's general counsel and an adverse witness, testified as follows:

> if the disappearance of these three clubs at this time were to happen [Cottage, Ivy, and Tiger Inn], it would be an almost unnoticeable effect. (R. at 3070a.)
>
> . . . if those students choices [to eat in private clubs] were to shift rapidly over time, we would adapt, and so I don't—I would not agree that we rely on, or [are] in some sense bound to permit the clubs to take a position. We would adapt if we had to. (R. at 3065a-66a.)
>
> I believe we do not try to get the clubs to feed these students. That is not our intent at all. (R at 3072a.)

Although others may have made statements about Tiger Inn and a relationship with Princeton University, the statements were not authorized or adopted by Tiger Inn.

In 1979, respondent Frank commenced an administrative action before the New Jersey Division on Civil Rights ("The Division") against Tiger Inn seeking, among other things to force it to admit women. After research and careful deliberation, counsel for Tiger Inn and the Board of Governors concluded that the club was protected by the federal constitutional right to freedom of association and could select its members on any criteria it chose.

The Division on Civil Rights dismissed the complaint on the ground that Tiger Inn was a "distinctly private" organization. Respondent refiled. The Division investigated for two

years and dismissed again on the same ground. (Appendix "A." at 230a.)

Respondent appealed. The New Jersey Superior Court, Appellate Division, reversed, stating that a "trial-type" hearing must be held by the Division to determine whether or not Tiger Inn was a private social organization. (A. at 223a.)

Despite repeated requests by Tiger Inn and other parties, the Division never held a trial on the issue. Using certain stipulations reached in preparation for a trial, the Division reversed its position, concluded that Tiger Inn was a "place of public accommodation" within the meaning of the New Jersey Law Against Discrimination, and denied Tiger Inn the right to formulate its own membership policies. (A. at 180a.)

A trial on the issue of remedies followed. After a lengthy trial, the Administrative Law Judge concluded that Tiger Inn, on certain conditions, need not admit women. (A. at 81a.)

The Division reversed the Administrative Law Judge and ordered the clubs to admit women. (A. at 68a.) Tiger Inn appealed to the Appellate Division, which reversed and remanded to the Division for the trial it had ordered earlier on the question of private social organizations. (A. at 38a.)

Complainant obtained discretionary review by the Supreme Court of New Jersey; and on July 3, 1990, the Supreme Court reversed the Appellate Division, reinstating the Division's order that Tiger Inn admit women. (A. at 1a.)

In spite of lengthy argument, both written and oral, by counsel for Tiger Inn, both times in the Appellate Division and then in the New Jersey Supreme Court, no New Jersey court ever discussed the right to freedom of association in a decision in this case. If the issue is not reviewed by this Court, it will have been argued interminably before the Courts of New Jersey and ignored uniformly by all of them.

PRESERVATION OF THE FEDERAL QUESTION

Tiger Inn raised the federal constitutional question repeatedly at every level; in its answer, whenever appropriate before the Division on Civil Rights, both times before the Appellate Division, and before the Supreme Court of New Jersey.

In a Letter Brief to the Appellate Division, dated October 12, 1982, which was the first time Tiger Inn was involved in formal proceedings, Tiger Inn argued the issue as follows:

> "IVY, TIGER AND COTTAGE CLUBS' RIGHT TO FREEDOM OF ASSOCIATION SHOULD NOT BE ABRIDGED.
>
> Plaintiff seeks to abridge the right to freedom of association to which the members of Ivy, Tiger and Cottage are entitled under the United States Constitution (First and Fourteenth Amendments) and the New Jersey Constitution 1947 (Article I)." [p. 17.]

A discussion of this Court's decisions on freedom of association followed.

After completion of the informal proceedings and the reversal by the Appellate Division, Tiger Inn asserted the following defenses in its answer:

> "FOURTH SEPARATE DEFENSE
>
> Respondent, The Tiger Inn, is not 'a place of public accommodation.'
>
> FIFTH SEPARATE DEFENSE
>
> Respondent, The Tiger Inn, is a bona fide private club."

On September 29, 1984, in its Brief to the Division on Civil Rights, Tiger Inn stated in POINT III:

"THE RIGHTS OF CLUB MEMBERS TO FREEDOM OF ASSOCIATION AND PRIVACY SHOULD NOT BE ABRIDGED

> Complainant seeks to abridge the right to privacy and freedom of association to which the members of Tiger Inn, Ivy, and Cottage are entitled under both the United States and New Jersey constitutions. U.S. Const. Amends. I and XIV; N.J. Const. Art. I (1947)" [(Citations to cases omitted) (pp. 22-23).]

A discussion of this Court's decisions on freedom of association followed.

Tiger Inn's November 15, 1984 Reply Brief contained a 13-page discussion of this right and the way it applied to Tiger Inn.

During oral argument at the July 29, 1986 hearing before the Administrative Law Judge this point was debated extensively. Counsel for Tiger Inn said:

> We are dealing with, in fact, we're dealing with at one level or another, the Federal Constitutional rights of freedom of association . . . .

In subsequent proceedings before the Office of Administrative Law, Tiger Inn raised the federal question in its brief as follows:

> Freedom of association is not a mere appendage to the rights enumerated in the First Amendment. It is an independent constitutional value fundamental to the concept of liberty. Freedom from compelled association is a corollary of the freedom to associate. Thus, the First Amendment protects Citizens in their choice either "to associate or not to associate with whom they please." [(Citations omitted.) (Brief at pp. 13-14).]

In its November 20, 1986 Proposed Findings of Fact and Conclusions of Law, this statement was repeated on page 20.

In its Brief to the Appellate Division, Tiger Inn argued the federal constitutional issue extensively [Brief, pp. 12-14, 25-41.] One major section of the brief began:

> "TIGER INN IS A *BONA FIDE* PRIVATE CLUB EXEMPT FROM THE NEW JERSEY LAW AGAINST DISCRIMINATION
>
> Both the United States and New Jersey constitutions guarantee the right to privacy and freedom of association. Private clubs are protected by the right to freedom of association and the right to privacy. These rights are essential to our system of ordered liberty." [Brief at p. 25.]

Pursuant to New Jersey Rules of Practice, Tiger Inn's brief in the Appellate Division was transmitted to the Supreme Court of New Jersey and became the club's brief before that court. Its lengthy argument on the federal constitutional right to freedom of association was, therefore, before the Supreme Court; and a great deal of the oral argument was devoted to this issue.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of this Court that define the right to freedom of association. (POINT I). The issue presented by this case is important to a large number of individuals and private organizations. (POINT II). In the past, this Court has concluded that the First Amendment guarantee of freedom of association is afforded private clubs. But under the New Jersey Supreme Court's definition of a private club, few will qualify for these protections.

The New Jersey Law Against Discrimination was not an independent ground of decision. The federal right to freedom of association was considered by the administrative agency, as is reflected in its decisions. Both Appellate Division decisions were reached on procedural grounds. The New

Jersey Supreme Court had the issue before it but did not address it. For its own reasons, that court chose not to address the federal right to freedom of association, and to focus on the state statute. However, the case could not have been decided without considering the federal issue. As the New Jersey Supreme Court applied the state law, it conflicts with and was construed in a way to eradicate the federal right. When a state court construes a state statute in that manner, it is not "an independent state ground," and should not dissuade this Court from granting the writ. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) ("Even if the judgment . . . must nevertheless be understood as ultimately resting on [state] law, it appears that at the very least the [state] court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue . . . ."); *See also Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145, 149 (1982); *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388 (1986).

POINT I

The Lower Court's Decision Conflicts With Prior Decisions of This Court.

The United States Constitution guarantees the right to freedom of association, a right that is derived from the First Amendment. This Court has held "that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 544 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (dissenting opinion); *Bell v. Maryland*, 378 U.S. 226 (1964) (concurring opinion).

In a concurring opinion in *Bell*, *supra*, in which both Chief Justice Warren and Justice Douglas joined, Justice Goldberg stated:

> it is the constitutional right of every person to close his home or club to any person or to choose his social intimates . . . solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties. [378 U.S. at 313.]

In a dissenting opinion which was joined by Justice Marshall, Justice Douglas said in *Moose Lodge*:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. [407 U.S. at 179-80.]

The constitutional protection of private clubs does not depend upon the truth, popularity or utility of the ideas and beliefs of their members. *NAACP v. Button*, 371 U.S. 415, 444-45 (1963). It protects citizens in their choice either "to associate or not to associate with whom they please." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984).

This Court has excluded clubs with a business purpose from the protections of the right to freedom of association. The evidence below clearly established that Tiger Inn is purely a social organization. There is no evidence of a business purpose or of any business conduct whatsoever. It is a fraternity with another name, and the college fraternity's right to base its membership qualifications on gender has been recognized by federal statute. 20 U.S.C. § 1681(a) (1990).

This Court has established the factors which determine whether an organization is public or private: size, purpose, policies, selectivity, and congeniality. *Roberts*, 468 U.S. at 620. As has been shown above, Tiger Inn is entitled to the

protection of the right to freedom of association if reviewed under these criteria.

The Court below recognized these factors but did not find that they sustained the federal right to freedom of association. Instead, it found Tiger Inn could not define its own membership criteria because of the following three conclusions:

(1) The clubs were held out as part of a club system which serves Princeton students;

(2) The clubs drew their membership almost exclusively from Princeton University students; and

(3) Princeton relied on the club system to feed a majority of its upperclass students. (A. at 27a.)

None of these findings were directed at Tiger Inn. None of them changed Tiger Inn's status. None of them were significant. None of them amounted to more than the natural consequences of an incidental geographic association between Tiger Inn and Princeton University. The three elements are irrelevant to the fundamental constitutional right. Tiger Inn satisfied every single requirement for a private social organization. By finding that certain additional factors deprived Tiger Inn of the right to fix its own membership criteria, the New Jersey Supreme Court ignored (it never discussed the right) or ran afoul of (it took away the right) federal constitutional law.

In any event this Court is not bound by the three conclusions. They were drawn from stipulated facts; and unlike resolutions of disputed issues at a trial (no trial was ever held on this issue), conclusions drawn from undisputed facts may be reconsidered by an appellate court. *Norris v. Alabama*, 294 U.S. 587, 590 (1935); *see also Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976).

In spite of lengthy briefing and protracted oral argument (three hours), the New Jersey Supreme Court did not discuss the application of the federal constitutional right in as much

as one sentence of its opinion. Therefore, the criteria specified by this Court have never been applied to Tiger Inn's federal right by any of the courts of New Jersey, Supreme Court or Appellate Division. By allowing a few flimsy additional factors to negate a clearly proven federal right, the New Jersey Supreme Court's ruling conflicts with decisions of this Court.

POINT II

The Lower Court's Definition of a Private Club Will Have a Broad Impact.

This case has been universally recognized for years as one of national significance. When the Division, in 1985, first found against Tiger Inn, the Deputy Director of the Division stated that the decision "much more narrowly defines what is a club" and added that the Civil Rights Division anticipated more organizations falling within its jurisdiction. (N.Y. Times, May 15, 1985, at B2, col. 5.) In 1987, after reversing the decision of the Administrative Law Judge and ordering Tiger Inn to admit women, the Director of the Division said that her decision would have an effect reaching far beyond the immediate parties, and that it demonstrated that the Civil Rights Division "is viewing more narrowly the question of whether heretofore thought 'private clubs' are distinctly private in nature." (Division on Civil Rights, N.J. Dep't of Law & Public Safety, *Outreach*, Vol. 4, No. 3 (July-Sept. 1987) at 3, col. 1.)

Princeton University Counsel Thomas Wright said that this case would "set a precedent either way it's decided" and that "it's highly likely to be carried on into fraternity and sorority relationships." Counsel for Rutgers University, David Scott, and Rutgers University Dean of Fraternity Affairs, Terry Reilly, agreed with Wright and suggested that fraternities and sororities could be the next target of the Civil Rights Division and that there could be a far reaching effect across the country. (*Frank Case Implications Feared; Princeton Bias*

Suit May Affect College Frats, UPI, June 20, 1986 (NEXIS, Nexis Library, Omni file).)

Respondent, too, has predicted a far-reaching impact for a decision that Tiger Inn is not protected by the right to freedom of association. At least as early as 1985, when the Civil Rights Division reversed itself and held against Tiger Inn, respondent stated that "[t]he decision has implications beyond college campuses . . . ." (N.Y. Times, May 19, 1985, § 1, at 38, col. 4.) At various times the respondent has referred to this case as "part of national efforts", "part of a larger issue around the country", and "part of the broader struggle" aimed at private clubs. (Shearman, UPI, Oct. 4, 1988 (NEXIS, Nexis library, Omni file); *State Supreme Court to Hear Discrimination Case*, UPI, Sept. 14, 1989 (NEXIS, Nexis library, Omni file); *Princeton's Men-Only Clubs Go the Way of the Packard*, AP, July 7, 1990 (NEXIS, Nexis library, Omni file).)

In 1989, 5,238 fraternity chapters existed on 805 college campuses. The members of the fraternities numbered approximately 400,000 undergraduates and 4.1 million alumni. As of June, 1990, 2,661 collegiate and 5,583 alumni sorority chapters with a combined membership of more than 2.5 million women existed. (National Interfraternity Conference, 1989 Annual Report; National Panhellenic Conference, Membership and Statistics (1990).) Therefore, the decision below will affect not only the 125 undergraduate and 1,700 alumni members of Tiger Inn but also the first amendment rights of millions of individual members of fraternities, sororities, and other private clubs.

Tiger Inn is not the only private college social organization already involved in litigation. For example, Fly Club at Harvard has been sued (*Schkolnick v. The Fly Club*, 81-BPA-0087 (dismissed March 14, 1990)); and the Whiffenpoofs, the famous all-male singing group at Yale, were attacked for their failure to admit women. (N.Y. Times, April 20, 1987, at C12, col. 2.)

Although we focused our discussion on the immediate impact of the New Jersey Court's decision on college social organizations like fraternities and sororities, if the rationale of that decision is correct, the members of many private social organizations will be deprived of their right to freedom of association by the application of any tenuous relationship with a surrounding public entity, whether it be a university, a municipality, or another organization.

In all of its recent decisions this Court has had the opportunity to say what is not a private club. *See, e.g., New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988); *Roberts*, and *Rotary Club*, *supra*. This case offers the opportunity to clarify the factors that define a private club and to say what it is as well as what it is not.

CONCLUSION

Tiger Inn is the most innocuous kind of social organization. But the right it represents is one of greatest importance to the 125 undergraduate members, who, under by-law and Board interpretation, determine Tiger Inn's admissions policies. The right is also vital to the many others who are similarly situated throughout New Jersey and the nation. We respectfully urge this Court to review the decision below.

Respectfully submitted,

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